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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 16.

INTERNATIONAL ASSOCIATION OF MACHINISTS; TOOL AND DIE MAKERS LODGE NO. 35, Affiliated With the International Association of Machinists; and PRODUCTION LODGE NO. 1200, Affiliated With the International Association of Machinists,

Petitioners-Appellants,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Appellee.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR APPELLANTS.

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Petitioners-Appellants,

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NATIONAL LABOR RELATIONS BOARD,

Respondent-Appellee.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR APPELLANTS.

NATURE OF APPEAL AND GROUNDS FOR JURISDICTION.

This is an appeal from the judgment of the United States Court of Appeals for the District of Columbia entered on November 20, 1939, in the case of International Association of Machinists; Tool and Die Makers Lodge No. 35, affiliated with the International Association of Machinists;

and Production Lodge No. 1200, affiliated with the International Association of Machinists, petitioners-appellants, v. National Labor Relations Board, respondent-appellee, dismissing a petition filed by appellants herein, seeking to review and set aside an order of the National Labor Relations Board. The decision of the Court may be found in 110 Fed. (2d) 29. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended. The case involves a determination of the validity, under the National Labor Relations Act, of certain powers assumed by the Board. Decisions of the various circuit courts of appeal are in disagreement upon the question of the extent of certain Board duties. Petition for writ of certiorari was filed with this Court on February 17, 1940, by appellants herein, and an order granting the petition for writ of certiorari was entered April 1, 1940.

STATUTE INVOLVED.

The only statute involved in the present case is the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. A. 151.

STATEMENT OF THE CASE.

This case arises from the refusal of the court below to set aside an order of the National Labor Relations Board, dated July 27, 1938, pursuant to a petition requesting review of such order filed in said court by petitioners herein. The order (see R. 325-366 at 362) from which review was sought and which was affirmed below required, among other things, that the Serrick Corporation of Muncie, Indiana, cease and desist from giving effect to a collective bargaining contract dated August 6, 1937, between petitioner, Tool and Die Makers Lodge No. 35, and the company, covering the tool and die makers employed by said Serrick Corporation

at its Muncie, Indiana, plant, and requiring said Serrick Corporation to recognize the International Union, United Automobile Workers of America (hereinafter called U. A. W. or C. I. O.), Local 1590, affiliated with the C. I. O., as exclusive representative of all the production workers employed by the Serrick Corporation at its Muncie, Indiana, plant, including the highly skilled tool and die makers there employed. Under said order and decision the Board (1) illegally invalidated a mutually advantageous collective bargaining contract, (2) arbitrarily and capriciously refused to prescribe as appropriate for purposes of collective bargaining a unit consisting of all such tool and die workers employed by the said Serrick Corporation at its Muncie plant, and (3) arbitrarily refused to investigate or take action on notice given to it by petitioners prior to its decision and order that the majority, to wit, 90 per cent, of the production employees of the Serrick Corporation had become affiliated with the petitioner, Production Lodge No. 1200.

The petitioners are labor organizations affiliated with the American Federation of Labor and enrolled employees of the Serrick Corporation at its Muncie plant—skilled tool and die craft workers, into Tool and Die Makers Lodge No. 35, and unskilled production workers into Production Lodge No. 1200. These two Lodges are affiliated with the International Association of Machinists, hereinafter referred to as I. A. M.

The respondent, National Labor Relations Board, is a Governmental agency organized under an Act of Congress known as the National Labor Relations Act, 49 Stat. 449.

The Serrick Corporation is engaged in the manufacture of bolts and screws, automobile mouldings, refrigerator parts and stenotype machines. It does a large interstate business and has an annual pay roll of over a million dollars.

The Company, as other similar plants, maintains a tool room in which it employs some sixty-three tool and die makers, whose duty it is to make and repair the tools and dies used in the production department of the plant. These tool room workers are highly skilled and receive a compensation considerably in excess of that paid the production workers. Their trade, involving a long apprenticeship, has long been recognized as a well defined craft. The tool room is separated from the production department by a wire fence. (See R. 95-99.)

The present controversy arises over attempts by petitioners herein, and the U. A. W., a rival labor organization, to enroll employees in the production and tool room departments of the Serrick Corporation at Muncie, Indiana, in their respective organizations. During the early summer of 1937 the U. A. W. had been conducting a campaign of organization among production employees of the Serrick Corporation. On July 28 of that year the I. A. M. began to organize the tool room employees. After forming Tool and Die Workers Lodge No. 35, and after having enrolled a majority of the tool room employees, it entered into a closed shop collective bargaining contract with said corporation on August 6, 1937. Subsequent to the making of said contract the I. A. M. started organizing the production workers into a separate local, Production Lodge No. 1200. This organization of production workers into a separate local was done in accordance with the constitution of the I. A. M. in force for many years, which provides for separate locals for non-skilled production employees who work on machines (R. 254-258).

Upon charges being filed by the U. A. W. with the National Labor Relations Board, a complaint was issued on October 5, 1937 against the Serrick Corporation, which, among other things, alleged that the corporation had discriminatorily discharged 18 tool room employees because of

their membership in the U. A. W., although such discharges were pursuant to the closed shop contract; that it had refused to bargain with the U. A. W.; and that it had by various acts of coercion and interference attempted to discourage membership in the U. A. W. and encourage membership in the I. A. M.

Prior to the filing of this complaint the U. A. W. had filed a petition for certification under Section 9 (c) of the Act in which it claimed to represent a majority in a unit consisting of the production workers, **exclusive of tool room employees.** On September 27th this petition was amended to include tool room employees in the unit. The petition and complaint were consolidated for the purpose of hearing, and the I. A. M. intervened in the joint cases on October 12th. A lengthy hearing, lasting from October 18th through November 18th, was conducted by a Trial Examiner appointed by the Board. All parties participated in this hearing. The Trial Examiner filed his Intermediate Report on March 4, 1938 (R. 299-321). He found, among other things, that the Company had interfered with the organization of **production workers** by the U. A. W.; **that the closed shop contract covering the tool room employees with the I. A. M. was valid and binding, having been entered into at a time when the I. A. M. represented an uncoerced majority of tool room employees**; that the Company had not assisted the I. A. M. in reaching this majority; that tool room employees constituted an appropriate bargaining unit.

The U. A. W. filed exceptions to this report. On July 27, 1938, the Board handed down its decision, reversing the Trial Examiner and substantiating for the most part the exceptions filed by the U. A. W. In this decision the Board invalidated the I. A. M.'s closed shop contract. The Board concluded that the I. A. M. did not represent an uncoerced majority of employees in the tool room at the

time of the execution of the contract, having been assisted by activities of certain tool room employees members of the I. A. M., whom the Board termed "supervisory" and whose actions were accordingly held attributable to the employer.

The Board further found that the tool room employees did not constitute an appropriate unit, but that the appropriate unit consisted of all production employees of the Serrick Corporation, including those employees employed in the tool room. The Board stated, however, that the only reason it did not designate the tool room as an appropriate unit consisting of craft workers as it customarily had done in previous cases, and did not give the employees an opportunity to indicate the type of representative, craft or industrial, they desired by voting thereon according to the Board "Globe Doctrine"[1] was because the tool room workers had been influenced in their choice by acts of so-called supervisory employees, and because the I. A. M. had organized the production and tool room employees at approximately the same time, thus making the division artificial. Chairman Madden dissented from this latter reason.

The Board, without holding an election, certified the U. A. W. as the exclusive bargaining agent for all the production and tool room employees of the Serrick Corporation. This was done in spite of the fact that prior to the issuance of the decision the I. A. M. had formally notified the Board that there had been a change in the employees' choice of a representative and that the I. A. M. now represented an overwhelming majority of the production workers as well as the majority in the tool room (see R. 11-15), and in spite of the fact that an election to determine this question was requested and in fact had been expected by all parties. The Board entirely disregarded such notice of

1 Matter of Globe Machine & Stamping Co., 3 N. L. R. B. 294, 3rd Annual Report, pages 167-174.

change in affiliation and did not even attempt to investigate the matters referred to by the I. A. M. in its notice.

Petitioners sought a review of this decision in the Court below.

The decision of that Court sustained in its entirety the order of the Board. The Court further held that the Board was under no obligation or duty to investigate the claim of the I. A. M. that the majority of the employees in the production department had changed their affiliation and now desired to be represented by the I. A. M., and that its certification of the U. A. W. as exclusive bargaining agent of all employees of the Serrick Corporation was proper. Chief Justice Groner dissented from that portion of the decision affirming the order of the Board holding invalid the closed shop contract covering the tool room workers. He held that the employees who engaged in solicitation were not supervisory employees in any sense of the word, but were merely ordinary employees soliciting on behalf of the union to which they belonged.

ISSUES PRESENTED.

This case involves three issues of importance in the interpretation and administration of the National Labor Relations Act:

I. The Board's order in the present case has abrogated a contractual relationship conducive to industrial peace between the company and its tool and die workers, because of alleged assistance rendered to the International Association of Machinists through certain employees, members of the I. A. M., who had engaged in organization activities on its behalf. The Board found these employees were "supervisors," rendering their conduct coercive and attributable to the employer. Employer hositility to a C. I. O. affiliate which previously had been attempting to organize

the production employees of the Serrick Corporation, and lack of such hostility to the I. A. M. in the tool room, was an additional circumstance found by the Board to support its finding of company assistance. The first question is whether these employees were in fact supervisors, and, if not, whether the Board's findings then support the conclusion of company assistance and warrant abrogation of the tool room contract.

II. The second issue involves a determination as to whether the Board acted arbitrarily in refusing to recognize an admittedly appropriate craft unit, consisting of skilled tool and die makers, requested by the I. A. M., and assimilating this unit into a larger industrial unit requested by a C. I. O. affiliate, such refusal being based solely on the reasons (1) that the employer had interfered with organizing activity of the C. I. O., and (2) that the I. A. M. also organized unskilled machine workers in the plant into a separate production local according to the requirements of its constitution. As is obvious, the question of the extent of Board discretion in determining units is of vital importance to the I. A. M. and to the American Federation of Labor, the parent body of many other craft organizations. The existence of craft unions is left to the whim and caprice of both the employer and the Labor Board, and the Board is given powers of supervision over union affairs never intended by the framers of the act, if extraneous factors, such as employer practices having no relation to the appropriateness of a unit for bargaining purposes, and over which a union has no control, or union organizational policies as established by constitutional enactment, are to determine the existence of a unit.

III. The third issue is concerned with the power of the Board to certify one of two rival organizations as exclusive bargaining agent on the basis of a year-old representation status in disregard of the verified claim of a change

in such representation status occurring in the year's interval between the hearing and the ultimate decision. The various circuit courts of appeal are at variance as to the duty of the Board under such circumstances, where notice of the change has been brought sharply to the Board's attention. The Board has held that it can ignore such claims. If the freedom of choice guaranteed by the act is to include freedom of change, it is of the greatest importance that the Board's present policy, productive of confusion and turmoil, be altered.

SUMMARY OF ARGUMENT.

I.

The four tool-room employees who engaged in soliciting membership in the I. A. M. were not supervisors as found by the Board. They were merely what are known in the trade as "lead men" who, because of greater skill and experience, undertake the job of setting up new work when it comes into the shop. After setting up the job, they return to the regular tool-room work. They receive no higher rate of pay, have no power to hire or fire, and are merely older, more experienced employees. They were members and officers of the I. A. M. local. Further, it was expressly stipulated by all parties at the hearing that these employees were not supervisory employees. If these employees were not supervisors, then their conduct is not attributable to the employer, nor is their conduct coercive.

The Board relies principally on the conduct of these four employees to find company assistance to the I. A. M. in obtaining the necessary majority membership prerequisite to making a closed-shop contract. Their conduct being neither coercive nor attributable to the employer, no assistance was given. Further, the activities of these four employees took place subsequent to the time that a majority had been enrolled with the I. A. M., and there is no finding of any unlawful activity contributing to the initial majority.

The Board relies on employer opposition to the C. I. O. in a prior organizing campaign among production workers, and lack of active opposition to the I. A. M. when it undertook to organize the tool room. This negative conduct cannot constitute unlawful assistance. The I. A. M. is not responsible for the employer's activities, and it cannot be excluded from bona fide attempts to organize because of

the existence of prior hostility to a competing labor organization.

II.

The Board admits that tool-room employees, consisting of skilled tool and die makers, are an appropriate bargaining unit, but states that employer interference in the tool room organizing campaign renders the unit inappropriate. The Board further states that the organizing policy of the I. A. M., as prescribed in its constitution, whereby it organized skilled machine workers in one local and unskilled machine workers in another local, rendered its claim for a smaller unit artificial.

In prescribing bargaining units, the Board customarily looks to such factors as training, skill, aptitude, mutuality of interests and historical development. The Board has found in all other cases that these factors combine to make tool and die workers appropriate craft units. If this is so, can an employer's activities, over which a union has no control, in any way change these factors, or make them any less determinative of the unit question? Do not such considerations still exist after, as well as before, any alleged unfair practices? The Board, seemingly, would put the determination of the unit in the employer's hands; for the employer, by simulated preference or assistance, could render invalid any unit requested.

It is the practice and policy of the I. A. M., as prescribed in its constitution, to organize highly skilled and highly paid craft workers into separate local unions, where higher dues are paid, greater responsibilities are carried, and insurance and death benefits are greater. Unskilled production workers who work on machines are organized into separate Production Locals. It is the usual practice to organize first the craft and then the production workers, and this was done in the present case. The Board's determination that the I. A. M.'s organizing poli-

cies make its claim for a craft unit artificial is arbitrary and constitutes an outrageous interference with the internal affairs of labor organizations. There is no reason why such policy should make a craft unit any the less appropriate.

Section 7 of the Act gives employees the right to select a representative, or type of representative, of their own choosing. In accordance with this mandate, the Board has laid down its so-called Globe doctrine, whereby, in all cases where conflicting claims are made as to two possibly appropriate units, it will hold an election to permit the employees themselves to decide which type of unit they prefer. The Board has refused to permit the skilled tool room employees to indicate whether they want a craft or industrial labor organization to represent them. If the Board feels that employer practices might have affected the choice, it should hold an election, as is its practice in other similar cases, at such time as the effect of the practices have abated or worn off. To this end, the Board can issue appropriate orders, require the posting of notices, and the like. Instead, the Board has destroyed the unit by prescribing the C. I. O. as the exclusive representative in the larger, all-inclusive unit, pursuant to which an exclusive contract was entered into by the C. I. O. Thus, for all practical purposes, the I. A. M. is effectively precluded from any chance of representing the tool room employees. The C. I. O. certification stands for a year, and after an exclusive contract has been entered into it is extremely difficult, as a practical matter and in view of the Board's decisions, thereafter to obtain a craft unit determination and win an election therein.

III.

Subsequent to the hearing, but prior to the Board's decision, which was issued almost a year later, the majority of

the employees in the production department of the company switched their affiliation from the C. I. O. to the A. F. L. The Board was notified of this change prior to its decision, but ignored such notice and ordered the employer to deal with the C. I. O. as exclusive bargaining agent for all production employees. By so doing the Board has disregarded the right of employees to change their representative, which is a concomitant of their right to choose a representative. Almost a year elapsed between the hearing and the decision, and the Board cannot require that the holding of a hearing shall freeze the representation status as it existed at the time of the hearing, regardless of how long it may take to decide the case, thereby depriving employees of the right to change their representative.

There is no finding nor charge that the change in representation took place as the result of the employer's unfair practices, and any presumption that it might have is rebutted (1) by the fact that a long period of time had elapsed between the hearing and the time when the change took place, (2) by the verified contention of the A. F. L. that it had an unassisted, bona fide majority, and (3) by the fact that the company, even though notified by the A. F. L. of its claim, nevertheless favored the C. I. O. by entering into an exclusive contract with the C. I. O. prior to the Board's decision.

If the Board would prevent industrial turmoil and chaos, it should at least investigate claims such as the present one, made under oath. If there is any merit to the claim, it could then hold an election which will dispose of any controversy as to representation for at least one year, for a Board certification is good for that time. Under such circumstances, the act cannot be made a "merry-go-round" by the filing of successive claims. In the present case the Board made no attempt even to investigate the verified claim, but instead ordered the employer to deal exclusively with a rival union representing only a small minority.

ARGUMENT.

I.

THE EMPLOYEES ENGAGING IN ORGANIZATIONAL ACTIVITIES WERE NOT SUPERVISORY EMPLOYEES SO AS TO MAKE THEIR ACTIONS COERCIVE OR ATTRIBUTABLE TO THE EMPLOYER. IF THESE EMPLOYEES ARE NOT SUPERVISORY, THEN THE BOARD'S FINDINGS DO NOT WARRANT CONCLUSION OF ASSISTANCE TO I. A. M.

The Board's order invalidated a collective bargaining contract, covering the tool room employees, entered into between the Serrick Corporation and Tool & Die Makers Lodge No. 35. The contract contained clauses advantageous to both parties, and its terms were conducive to industrial peace. Among other things, the contract stated that "during the life of this agreement no strike shall be caused or sanctioned by the union and no lockout shall be entered upon by the employer until every peaceful means of settlement of the difficulties have been tried" (R. 7-10). The Board's reason for nullifying this contract, as stated in its decision (R. 340), was that the I. A. M. had been assisted in obtaining the requisite majority "by a corps of supervisory employees."

A. The Record Does Not Warrant the Finding That Fouts, Bolander, Dininger and Shock Were Supervisory Employees.

The "corps" of so-called supervisory employees to which the Board refers in its decision as soliciting membership in the I. A. M. consisted of four employees—Fouts, Dininger, Bolander and Shock (R. 340). Two other tool room employees, Byroad and Baker, were also alleged to

have engaged in electioneering activities, but there is no attempt to classify these two as "supervisory employees" (R. 341). These four men were members and officers of Lodge 35, all being eligible to membership under the constitution of the union.

The Board's order, nullifying the contract, accordingly must rest on the validity of the finding that these four employees were supervisory—first, to render their conduct, which consisted only of ordinary solicitation, coercive, and, second, to attribute such conduct to the employer.

What does the record show as to the status of these four? We find, in the first place, that these employees were not foremen, let alone supervisors entrusted with executive or directorial functions. They were in no real sense ever minor supervisory employees, such as straw bosses. None had been accorded any special powers of direction or control by the employer, or had any power to hire or fire. They were merely what is known in the tool and die workers' trade as "lead men." A lead man is a tool and die maker, who, by reason of long experience, or by previous experience on a particular job, has become skilled in the method of handling new jobs that come into the shop. He determines the best method of doing the job, which tools should be used, how the job is to be set up. A lead man is not looked up to as an actual "boss," even though at times they may be so termed when directing the set-up of work. So, for that matter, would an apprentice or helper call an ordinary machinist his "boss." The lead men, after having set up the work, engage in tool and die making with the other tool and die workers, unless it is a very large shop, in which case they are sometimes engaged in set-up or "lead" work a greater part of the day (R. 33, 58, 116).

The Board states that Fouts, alleged to be most active on behalf of the I. A. M., was "in charge of the roll department in the tool room and worked alongside of certain

machinists whom he directed." As explained, his duties consisted of setting up the work and in making "rolls" for the rolling department, on which latter job he was the **sole** worker (R. 138). He worked on the first shift, where either McCoy or Dominick, foreman and assistant foreman, respectively, were present and in sole and complete charge all of the time.[2]

Although it is stated that Fouts made recommendations, this was due to his seniority standing rather than to any official position he held; such recommendations may be and are made by any employee. Fouts describes himself as an ordinary tool maker who makes all of the rolls for the rolling department (R. 138). The Board's witness described Fouts as follows:

> "Walter Fouts was more or less an assistant foreman, in that he had certain machinists under—in his charge, who manufactured rolls for the rolling and molding departments, and he was also authorized to sign requisitions, and he also worked along with men who worked for him."

The foregoing evidently is what the Board relies upon in finding Fouts a supervisor. It should be noted that the same Board witness, in describing solicitation by Fouts, says that, while he was being solicited by Fouts for membership, **his foreman** (McCoy) was sixty feet away (R. 22).

Shock describes himself as an ordinary tool maker and tool repairer (R. 120). He is described by the Board's witness as "sort of assistant foreman" "about half of the time" (R. 45). Another Board witness, when asked if Shock was an assistant foreman, stated, "Well, I don't know whether he was. He kind of had charge of the roll department there" (R. 54). Other Board witnesses de-

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2 There is no finding that McCoy or Dominick engaged in any electioneering activities, though they might well have been expected to, had the I. A. M. organizational drive been company inspired and directed as charged by the Board.

scribe Shock as "a tool and die maker" (R. 57) and "another employee in the tool room" (R. 90).

As before stated, both Fouts and Shock worked on the first shift, where McCoy and his assistant, Dominick, were in exclusive charge all the time. To hold that the foregoing testimony, which is the only testimony in the record on which the Board can rely, is sufficient to constitute these men members of the executive or supervisory force of the plant, and thus agents of the employer, is preposterous. The best indication that these employees were merely ordinary employees is seen from the incidental reference to their status in the testimony of Board witnesses. One Board witness speaks of much agitation and antagonizing "by employees in the tool room," and by such employees he says he refers to Byroad, Shock and Fouts (R. 47). Another Board witness, when asked what were the duties of Byroad, Fouts and Baker, s tes "making dies" (R. 50).

Further, the Board does not claim that Bolander and Dininger, except for one instance,[3] did any actual soliciting, but merely stated that they stood idly by while soliciting went on, although the record is clear that both sides were engaged in organizing activities during working hours.

Bolander and Dininger were not "foremen." It is very misleading for the Board to call them "foremen" on the third and second shifts, respectively. The working hours of the plant were divided into three shifts; the first, the normal and principal shift, in which some fifty of the sixty-three tool room employees worked; the second, an evening shift in which eight or nine of the employees worked, and the third, an early morning shift in which three or four worked (R. 115). McCoy and Dominick had complete

[3] Dininger is reported to have said to a tool room employee that he would get a better rating if he joined the A. F. L. What was meant by this statement is not disclosed. It should be noted that this occurrence took place on August 10th, after the closed-shop contract had been agreed to, and long after a majority had been obtained. This is the only instance of any solicitation engaged in by Dininger.

charge of these shifts, one being in charge when the other was not there (R. 102, 110). They would appear at various times on all three shifts, whenever possible. McCoy was present most of the time on the second shift, as well as the first (R. 116). On the last two shifts there were not enough tool room men working to require another foreman, or any foreman at all on the last shift. Although Dininger and Bolander, as older, more experienced employees, were lead men on the latter two shifts and would refer men to new jobs if necessary, neither Dininger nor Bolander had any higher classification, received any higher rate of pay, nor had any greater power than other employees. The only actual description of the duties of Dininger and Bolander in the record is made by McCoy, the foreman. He stated that these men looked after things at night; that in a way they were in charge of the shift. He said, "I didn't try to line up every man with their job. I just told him—or gave him a list of the work I wanted done, then he distributed it" (R. 114-115). Bolander describes himself as an ordinary tool maker (R. 137).

In addition to the foregoing considerations, there are uncontested exhibits and a stipulation entered into by all the parties which conclusively indicates that these employees were not "supervisory employees." Respondent's Exhibits Nos. 6 and 7 (R. 177-178) list the working employees in the tool room and designate the supervisory employees. The only persons named as supervisory employees are McCoy, foreman, and Dominick, assistant foreman. These exhibits stand unrefuted.

Of greater and conclusive significance, however, is the stipulation entered into by the unions, the Labor Board and the employer, listing the ordinary working employees in the tool room (R. 169). This stipulation **expressly excludes "foremen, office employees and other supervisory employees."** The names of all four of the employees whom the Board now claims to be "supervisory employees" are

expressly **included** in the list. The names of McCoy and Dominick are omitted. The Board's attorney signed the stipulation and the Trial Examiner found the stipulation binding. It was not until the Board's decision that it was challenged. Chief Justice Groner emphasizes the significance and binding effect of this stipulation in his dissent (R. 401).

Because of this stipulation no attempt was made by any of the parties to prove that these four either were or were not in any supervisory capacity. Apparently, the conclusion of the Board that they were supervisors came as an afterthought, based on statements made by Board witnesses incidental to other testimony. For instance, the Board seized upon a remark made by one of the C. I. O. members, discharged because of the contract (and seeking back pay because of alleged invalidity of such contract), that Fouts "was his boss." This remark is nothing but a self-serving declaration and is, moreover, a pure conclusion entitled to no weight whatsoever as evidence.

B. Acts of Solicitation by These Four Union Members Not Coercive and No Finding in Board Decision That They Were Direct Agents of the Employer.

The Board claims that the solicitation by Fouts and others was done "pursuant to the known desires of the employer," and, therefore, states that these solicitations must be attributed to the employer.

There is no finding that any solicitation was done pursuant to any order or direction of the employer. The Board arrives at the finding necessary to attribute conduct of these employees to the employer—to wit, the finding that the employer had made known his desires in the matter—by deducing this from the very act of solicitation itself.

It is important to bear in mind that these four employees

were members and officers of Lodge No. 35. When officers and members of a union solicit membership for that union, at least the prima facie inference would seem to be that these activities are carried on on behalf of the union, not on behalf of the employer. However, the Board places the inference the other way, and without any supporting evidence other than the very fact of solicitation finds that the employer, and not the I. A. M. directed the solicitation to be done.

If these four employees were not exercising supervisory powers, the Board's entire case must collapse, for the Board relies solely on the activities of these four employees and on their status as supervisors, both to render their conduct coercive and to attribute it to the employer. The findings in the Board's decision relative to the activities of these four employees are that they engaged only in ordinary electioneering or organizational work, activity in which any union member, interested in the furtherance of his organization, might be expected to engage. There is no finding of any threat of discrimination or similar conduct on the part of these four or anyone else, except for two references too trivial upon which to base a finding of assistance.[4] The Board finds nothing but ordinary solicitation and persuasion, and it is only the alleged status of these four as supervisors that renders this conduct coercive.

The court below, but not the Board, found that, regardless of whether these employees were supervisors, their relationship with the company was such as to make them its direct agents. The Court delves extensively into the record in an effort to support this conclusion, and, finding

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4 Shimer, night superintendent, was alleged to have stated to a tool room employee "about July 26th" that "Mr. Serrick would recognize an A. F. L. but he would not recognize a C. I. O. union." On August 6, the date the tool room contract was agreed upon, Lewis, the personnel director, asked two tool room employees why they did not join the A. F. L. and said to "straighten things out and have one organization in here."

them all old and trusted employees—some of them personal friends of the executive officers—and that one of them, Fouts, had been active in organizing the Acme Welfare Association, concludes that they are "tools" of the employer.

None of these lengthy findings on which the Court below bases its conclusion of direct agency finds any support or counterpart in the findings of the Board except, possibly, the finding of Fouts' activities on behalf of the Acme Welfare Association, which certainly is not sufficient in itself to warrant the conclusion of an agency. It is submitted that it is for the Board, and not the reviewing court, to determine the existence of facts relevant to the case. The act provides that the findings of fact made by the Board shall be conclusive if supported by evidence. Further, it is the rule that an appellate court will not make findings not made by the trial court, even though the evidence clearly warrants them; nor will it add to a special finding of fact, unless that which is added results as a necessary conclusion from the facts found. See 3 Amer. Jurisprudence 462; 4 C. J., page 656, and cases cited thereunder. The Board is the tryer of the facts. It is to be presumed that any findings which the Board fails to make, even though supported by statements in the evidence, were not made either because such testimony was contradicted by other testimony in the record or because it was insubstantial, incredible, or otherwise unsatisfactory.

If we confine ourselves to the findings in the decision of the Board, it is impossible to draw any conclusion of agency. The inception of the movement to organize tool room employees is described in the Board's decision as an independent movement, instituted by Fouts, Byroad and Baker, and having no connection with the employer, unless these employees are found to be employed in a supervisory capacity. The trial Examiner who heard the evidence

found that the impetus to organization came from the unwillingness of the skilled tool-room employees to go along with the U. A. W. (C. I. O.), an industrial union (R. 307-309). True, there is found a history of opposition to the C. I. O. and a dislike by Fouts and others for that organization. Such a finding, however, does not warrant a conclusion that the four tool-room employees most active on behalf of the I. A. M. were mere minions of the employer, or that their efforts to organize an A. F. of L. craft local were by the employer's direction.

C. Prior Employer Opposition to Competing Union and Lack of Opposition to I. A. M. When It Later Attempted to Organize Cannot Constitute Company Assistance to I. A. M.

The Board, as well as the court below, as pointed out in the dissent of Chief Justice Groner, places great reliance for its finding of company assistance to the I. A. M. on its finding of active company opposition to the C. I. O. at a time when the I. A. M. was not in the plant, and a lack of active opposition to the I. A. M. when it, in turn, attempted to organize, first, the tool room and then the production employees. The Board's decision finds that the C. I. O. began its organizational campaign during the month of June, 1937. Its activities were centered in the production department. In the succeeding months it met with opposition from the company, evidenced principally by various remarks of various executives of the company expressing dislike for the C. I. O., and a company union was promoted in an effort to defeat organizing activities. On the evening of July 28, 1937, the I. A. M., for the first time, made its appearance at the plant. C. F. McDonald, an International representative of the I. A. M., after being approached by several of the tool room employees on that same date, called a meeting for that night, at which meet-

ing thirty-four of the sixty-three of the tool room employees signed application cards. McDonald continued organizational activities in the tool room for the next nine days, using employees who had signed membership cards to assist him. Among these were the four so-called supervisory employees. On the 6th of August a contract was agreed upon between the machinists and the company, but it was not signed until the 11th, due to the absence of the president. The I. A. M. met with no active opposition in its organizational attempts in the tool room, but neither did it obtain any company assistance, unless Fouts, Dinger, Bolander and Shock can be considered supervisory employees.

The Board relies on the finding of opposition to the C. I. O. and lack of company opposition to the A. F. of L. to establish the fact of company assistance to the A. F. of L. The Board thereby holds in effect that, in a case where two rival labor organizations are competing in a plant, any attempt on the part of the employer to interfere with the organizational activities of one organization operates as a matter of law to encourage and assist the other organizations. Apparently the Board would so hold, even though one organization was not present in the plant or actively competing with the complaining organization at the time of the interfering activities and did not appear for months subsequent to that time, and even though the employer had no knowledge and did not anticipate that that organization would also attempt organization in the plant. Such employer activity, the Board states, operates to bar the union not discriminated against from organizing in that plant for an indefinitely extended period.

Such a doctrine is not only manifestly unfair and arbitrary; it is contrary to specific provisions of the National Labor Relations Act guaranteeing to employees the right to engage in concerted activities for the purpose of collective bargaining, and to form, join or assist labor organiza-

tions. Are such organizations to be deprived of their right to organize because of the previous existence of an employer's unfair activities over which the organization has no control and which were in no way prompted or supported by it?

The Board's decision does not hold that the I. A. M. was brought into the plant at the instance of any supervisory official of the company other than the four employees we have been discussing. **On the contrary, it is clear from the record and the decision that the impetus to organization came from the employees themselves.** (See Decision, R. 339.) These skilled tool room employees, as the trial examiner has found, preferring the American Federation of Labor craft union to a C. I. O. industrial union, themselves sought out an I. A. M. organizer and secured representation through the I. A. M. The Board has entirely overlooked their wishes and rights in this matter. Because the employer did not immediately assume the most hostile attitude possible toward this attempt to organize a small group of its most skilled employees, the Board has found company assistance and has vitiated the contract entered into by the machinists as the representative of the skilled tool room employees of the employer.

Further, the Board has failed to give consideration to the fact that these four alleged supervisory employees were members and officers of the I. A. M. If the activities which took place in connection with the attempted organization in this plant by two rival labor organizations are to be outlawed as unfair practices, then in nine out of ten cases where rival national organizations are contending there will likewise be found countless incidents of the same general type here proscribed, which can be used as a basis for upsetting the stable relations resulting from entering into collective bargaining contracts. It is inevitable that all employees, eligible to and members in labor

unions, will speak on behalf of their organizations. And it is their right so to do.

Relying on the Board's own findings—and it is on these findings alone that the case must be decided—it is obvious that no conduct attributable to the employer operated to assist the I. A. M. in obtaining its majority, unless we consider prior opposition to C. I. O. organizing activity in the **production** department and a lack of active opposition to subsequent American Federation of Labor attempts to organize in the **separate, tool room department** to constitute such assistance, and unless we find that Fouts, Bolander, Dininger and Shock were supervisory employees so as to make their mere solicitation coercive and attributable to the employer. The Board's whole case rests on these conclusions, which, we submit, are incorrect.

D. No Finding of Unfair Practices Contributing to Initial I. A. M. Majority in Tool Room. Accordingly, Contract Valid.

An additional and important reason for holding the Board's invalidation of the tool room contract unlawful is as follows: There is no finding by the Board that there were any unfair practices of any kind on the part of the employer assisting the I. A. M. prior to the time that the I. A. M. had obtained a majority membership on July 28, 1937. It follows that any course of activities on the part of the employer subsequent to the time of obtaining a lawful majority would, first, be irrelevant, and, second, would be permissible, provided that such activities did not operate to enable the I. A. M. to retain that majority. It is not the fact that any so-called unfair practices operated to enable the I. A. M. to retain its majority; there is no evidence to give rise to any such inference; **and, most important, the Board made no such finding.**

This argument does not, as the court below seems to feel (see Sec. 5 of the Opinion), ask the Court to confine its

consideration of the evidence to occurrences in the tool room during the nine-day period between July 28th, when a majority of eligible employees had signed application cards in the I. A. M., and August 6th, when the contract was agreed upon by the company, although not signed.

We merely state that what occurred subsequent to the 28th is irrelevant, unless the Board wishes to make a finding from such occurrences that the majority obtained on the 28th was maintained only because of unfair practices. This finding the Board did not make.

Although the Board found as a fact that on the 28th of July a majority of the tool room employees had signed application cards in the I. A. M., both it and the court below seemed to disregard this very important fact.

It is submitted that it is very necessary to ascertain whether any assistance had been proffered to the I. A. M. prior to the 28th to enable it to obtain this majority. The Board's decision is barren of any finding warranting a conclusion that the July 28th majority had been obtained through active assistance and connivance of the Serrick Company. The Board is only permitted to attack a majority status if it finds that such status had been reached through assistance of the employer. All the Board's findings in respect to "assistance" indicate that the "assistance," whatever it may have been, occurred after, and not before, the majority had been obtained. Section 8 (3) of the National Labor Relations Act specifically preserves a closed-shop contract made by a majority which has not been assisted by an unfair labor practice. It is submitted that the thirty-four tool room employees who became members of the I. A. M. the evening of July 28th constitute such majority, and the contract made by them is an entirely valid one.

II.

THE BOARD ACTED ARBITRARILY IN REFUSING, FOR THE REASONS STATED IN ITS DECISION, TO DESIGNATE THE TOOL AND DIE ROOM EMPLOYEES AS AN APPROPRIATE BARGAINING UNIT.

A. Board's Power to Prescribe Units Cannot Be Exercised Arbitrarily.

The National Labor Relations Act gives the Board the power to prescribe bargaining units. In the exercise of this function the Board is able to exert considerable control over the destinies of craft labor organizations. Craft units usually consist of small, skilled groups of employees. Such groups can, under the act, be assimilated into larger units, such as plant-wide units, by administrative fiat, and their existence as bargaining crafts thereby destroyed. It is because of the discretion lodged in the Board, concerning unit determinations, and the threatened and actual destruction of craft organizations through refusal to recognize craft lines, that the American Federation of Labor and its craft affiliates have suffered most severely under the act. On many occasions the Board has seized upon some slight circumstance as reason for designating a larger bargaining unit contended for by a rival organization to the exclusion of a smaller craft unit. Because of the disastrous consequences of an improvident or arbitrary exercise of the discretion that has been lodged in the Board with respect to unit determinations, it is of the utmost importance that this discretion be exercised with the greatest caution and restraint, and with diligent respect for the existence of historic craft lines.

The Railway Labor Act confers similar discretionary powers to prescribe units on the Railway Mediation Board.

The Circuit Court of Appeals for the Sixth Circuit, in **Brotherhood of Railway and Steamship Clerks et al. v. Nashville, C. & St. L. Ry. Co.**, 94 Fed. (2d) 97, in discussing the limits of this power in respect to craft determinations, states as follows:

> "As indicated in the companion case, supra, it is apparent from a careful reading of the Railway Labor Act that the intent of the Congress was to preserve existing crafts and classes of employees as units for collective bargaining with employers. This constituted in part at least the rationale of our decision."
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> "The terms 'craft' or 'class' are not defined. It is fair inference that the Congress intended that collective bargaining groups already constituted and functioning were to be recognized, and it is likewise fair inference that the terms were left sufficiently elastic to meet not only changing conditions but also varying existing conditions among the employees of carriers differing greatly in size, number of employees, intensiveness of their organization, and differences in its origin, scope, and development."
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> "It may be deduced from this that there is no contention that the Board may of its own motion establish crafts or classes by arbitrary rulings as to grouping, or that the Board is authorized by the statute to ignore historical development, the wishes of the employees, or other factors material to a determination of the existence and scope of existing craft or class groups."

B. **Board's Reasons for Refusing to Designate I. A. M. Craft Unit Are Arbitrary.**

The present case is a classical example of the Board's proclivity to seize upon some irrelevant circumstance as

reason for favoring the industrial type of unit sought by a rival labor organization. The Board has here formulated two theories under which it has refused to recognize the craft unit requested by the I. A. M. Neither of these theories have any possible relevance to the appropriateness of the unit or the purposes of the Act.

The Board states that in the present case the tool and die makers ordinarily constitute an appropriate unit for bargaining purposes, but says that it cannot designate such unit in the present case for two reasons, and two reasons only. These reasons are: (1) The employer had engaged in unfair practices which might affect the choice of the employees in the unit, and (2) the I. A. M. had attempted to organize the production workers who work on machines into a separate production local at approximately the same time it had organized the tool room employees, thus making the two units artificial.

It is submitted that these reasons are arbitrary in the extreme. The Board's action in the present case can have an origin only in a desire to favor industrial units, or a desire to inflict punitive measures upon an employer, or a desire to supervise organizing policies of bona fide labor organizations, none of which functions have been conferred upon it by Congress.

It is important to note that the above two stated reasons are the sole reasons for the Board's refusal to designate the tool room unit. Counsel for the Board, in his brief, and the majority opinion below both wrongfully attempt to bolster the unit holding by setting forth other factors **not** relied on by the Board in its decision as affording reasons for a refusal to designate the craft unit. We quote the Board's decision in this respect:

> "**While ordinarily we have regarded as controlling the free choice of a majority of the employees in a well-defined craft** as to the form of organization they

desire, in the present case the respondent's conduct in influencing such choice precludes the application of this doctrine in the determination of the appropriate unit or units. Furthermore, for the purposes of the act, and under the circumstances of the present case, the division of the respondent's employees by the I. A. M. international into two locals for organizational purposes must be deemed artificial."

It is to be further noted that the Board clearly admits that the tool room unit is otherwise an entirely appropriate one.

1. Tool and Die Room Clearly an Appropriate Unit.

In determining whether requested units are or are not appropriate for bargaining purposes, the Board customarily considers such factors as training, skill, and aptitude of the employees in the unit, mutuality of interest, historical development, and methods of bargaining in the industry, and other factors indicating a community of interest that promise success to bargaining attempts in the proposed unit. (See Third Annual Report N. L. R. B., pages 156 through 196.) In all other cases prior to the present one, the Board had found that tool and die makers were an historical craft and constituted an appropriate bargaining unit. The Board has not found that any of the many factors of appropriateness do not exist in the present case, or that the work of the tool and die makers employed at the Serrick Corporation differs in any respect from the work of tool and die makers in other cases where it has certified a tool and die room as an appropriate unit. Can an employer's unfair labor practices or a union's organizing policies operate to make this unit any less appropriate, or to permit the Board to deny the craft employees in such unit the right to select the type of representative—craft or industrial—that they prefer? It is submitted that it cannot.

Tool and die makers compose an historic craft. For reasons of skill, for reasons of specialization of abilities, by reason of the handicraftsman's pride in his work, by reason of the distinct nature of the work performed by them, tool and die workers have banded together in American industry as a group separate and apart from other mechanical workers. Four or five years apprenticeship, plus five years additional experience, are required to make a good toolmaker. They have received higher wages, have commanded respect and freedom in every plant, are looked up to as skilled technicians, and generally enjoy an advanced position in the field of labor. Their working quarters are usually separated from the rest of the production departments of the plant, either by being enclosed in a separate room or being set off by fences and gates, as in the present case. The sixty-three tool and die makers employed by the Serrick Corporation were the highest skilled employees in the plant and received a rate of pay higher than the ordinary production workers. The work consisted solely of making and repairing tools and dies. None of the products manufactured or sold by the Serrick Corporation were made, or even worked upon, in the tool room. The only persons from the production department allowed in the tool room were foremen or set-up men who would bring some tool to be repaired (R. 95-99).

2. Tool Room Employees Have Right Under Section 7 of Act to Choose Own Type of Representative.

Section 7 of the National Labor Relations Act specifically provides that employees shall have the right to form or join labor organizations of their own choosing, and to select their own bargaining representative or type of representative. In line with this mandate, the Board has established a policy of ascertaining, by vote or otherwise, the desire of employees in two conflicting, but possibly

appropriate, units. Whenever two rival labor organizations attempt to enroll employees of a particular plant into their respective ranks and one labor organization is proceeding on a craft basis, the Board, in accordance with this policy of looking to the actual desires of the employees as the greatest single controlling factor in designating a bargaining unit, will hold an election to let the workers indicate their wishes in the matter. This procedure is an application of what is known as the Globe Doctrine (page 168, Third Annual Report, N. L. R. B.). In the present case the Board has denied the employees this right, contrary to Section 7 of the Act and contrary to its own Globe Doctrine. Instead, it has ordered the tool room employees assimilated into the larger industrial unit.

3. Employer Activity Cannot Affect Unit.

Let us examine the validity of the reasons assigned by the Board for its action and the consequences of upholding such action. First, as to the reason of the employer's unfair practices, we assume, for the purpose of this argument, that the employer has assisted the I. A. M. to obtain membership through solicitation by supervisory employees. Is there any reason why this action should operate to destroy the appropriate unit? It may be that the employees cannot express their free choice and desire as to which type of representative—craft or industrial—they desire until after the employer has been ordered to cease and desist his practices and until after the effects of his activities have worn off. This the Board can easily and quickly accomplish, as it has on other occasions, by the posting of notices, making of appropriate orders and the like. But should acts of the employer, over which neither the union nor the employees in the unit have any control, overcome all the circumstances and factors of appropriateness otherwise existing? Surely, none of these circumstances

are in the least changed or altered by the employer's activities. If, previous to the unfair practices, there existed a mutuality of interest by reason of skill, by reason of apprenticeship requirements, by reason of higher wages, by reason of physical factors, these circumstances are still in existence after the unfair practices. Why should any act of coercion or discrimination on the part of the **employer** among employees in that unit operate to destroy it? The only proper concern of the Board in such cases is to see to it that the choice of the employees is exercised under fair conditions. In the present case the Board has gone to the extreme extent of penalizing not only the employer, but the union and the employees of the company who belong to that union. **It has permitted the employer's acts to destroy the unit,** and as a punitive measure turned over representation to a rival organization whom the employees do not want.

This is all the more inexplicable when it is considered that **in all other cases** where unfair practices were found to have destroyed free choice, as in cases where illegal contracts have been entered into, or as in a case where an election has been interfered with by an employer's activities, the Board has merely ordered the employer to cease such practices, and then has directed an election to be held in the future when the effects of the unfair activities shall have diminished. (See Third Annual Report, page 143, Sec. c.)[5] In such cases it does not change the unit in

[5] The Board's brief asserts that in complaint cases involving a refusal to bargain, as well as charges of interference and coercion, it does not postpone the election to permit the effect of the unfair practices to wear off. Obviously, in such a case an election is not necessary, even to ascertain whether a majority exists, yet alone to ascertain the choice of a unit. Further, there is no unit determination of any kind required, for a refusal to bargain assumes that it is in some appropriate unit. The case is different where a rival organization is claiming a smaller unit and the Board is confronted with the problem of determining which of two units is appropriate. It is only when this conflict exists that the necessity for holding an election, not necessarily to determine the majority, but to determine a choice of unit, arises. It is correct to state that in all cases where any necessity for an election arose, either to ascertain a majority

which the contract was made or in which an election was held. Why is not that procedure followed in the present case? There is no difference in applicable principles. In both cases the Board is interested only in finding out what the employees want. And yet in the present case the Board has suddenly become interested only **in what it thinks the employer does not want**, and disregards both employees and the union in seeing to it that the employer does not get it. It is difficult to imagine a clearer case of punitive jurisdiction, condemned in the case of **Consolidated Edison Company v. N. L. R. B.**, 59 Sup. Ct. 206. In that case it is further stated that nothing that **the employer** may do can deprive the employees of the right to choose their own representative for collective bargaining purposes.

Further, it is very important to note that the rule established by the Board in the present case would afford the employer an easy method for destroying craft units by simulated assistance or preference. He need merely render some assistance to a union which is attempting to organize a group of his employees. The assistance might be unasked for and unwanted. The Board could then state that, because the employer has affected the choice of his employees, the unit can no longer be considered appropriate. The holding of the Board in the present case is no more preposterous than this.

We do not ask that the Board give effect to a unit whose ostensible choice by the employees in it is the result of their employer's unfair practices, but we do insist that opportunity for a free exercise of that choice be granted if the unit in question is otherwise admittedly appropriate, as in the present case. The I. A. M. is not, nor has it been found to be, responsible for any activities

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or to determine a unit, and there have been unfair practices which might affect a choice, the Board held an election after it had ascertained that the effect of the unfair practices had abated. In the present case the Board uses the possible effect of an unfair practice as a reason for not prescribing the unit at all.

the employer may have indulged in in this case. Employees in the tool room are entitled to an opportunity to select the type of representative, craft or industrial, that they prefer, and the I. A. M. is entitled to be the craft representative if chosen by these employees.

4. Craft Unit Here Destroyed; Representation Petition a Year Later No Remedy.

It seems clear, then, that under the Board's reasoning the mere fact of an employer's unlawful activities over which a union has no control can operate to destroy a craft unit and to deprive a craft union of its bargaining status. The Board argues that the craft unit is not destroyed, nor the union prevented from bargaining, because the union might ask for an election at a later date under section 9 of the act. The Board states that it has expressly reserved that right in the present case by attaching a proviso to its order nullifying the tool room contract, providing that nothing in such order shall preclude the company from hereafter making an agreement with the I. A. M. or any other labor organization, if such representative is the majority representative in an appropriate unit. The proviso is, of course, merely an expression of the law as it exists and is further meaningless because it fails to indicate what unit is appropriate. Presumably, the plant-wide unit, which the Board has just designated, would be the only appropriate unit. More important, the argument that the I. A. M. may still resort to a petition under section 9 of the act completely overlooks the following important considerations:

1. The Board's designation of a unit and certification of a representative therein is binding for a period of at least one year. (See **Todd Johnson Dry Docks Co.**, 10 N. L. R. B. 629.)

2. A closed-shop contract may be entered into embracing a larger unit, thus foreclosing or seriously hampering further organizational activities by a rival union in the smaller unit. Apart from any considerations of a closed-shop contract, it is very difficult, as a practical matter, to maintain an organization in a group that has been refused recognition as a bargaining unit and that is being exclusively bargained for by a rival organization on a plant-wide basis. For all practical purposes, certification for a period of one year precludes for a period of many years any hope of winning an election even if the smaller unit would be designated. The damage was accomplished by the original arbitrary refusal to designate the admittedly appropriate unit.

3. Under the existing decisions of the present Board it will be impossible to obtain a change of decision as to the unit question. It is the invariable holding of Board Member Smith that, in the absence of a prior history of craft bargaining in the plant, an industrial or plant-wide unit constitutes the only appropriate unit. See dissent in matter of **Allis-Chalmers Co.**, 4 N. L. R. B. 824.) It is the invariable holding of Board Member Leiserson that a history of a previous contractual relationship on any given unit basis is conclusively determinative of the unit question. (See decision in matter of **American Can Co.**, 13 N. L. R. B. 1252.)

In view of these considerations, any suggestion that there is available the remedy of a petition at a date not less than a year following the decision is facetious and insincere in the extreme.

5. Internal Policies of Union Cannot Affect Unit.

The second reason advanced by the Board for refusing to designate the unit asked for by the petitioners is that the I. A. M. had chosen to organize both the tool room and

the production departments at approximately the same time, thus making artificial the unit contended for, and estopping themselves from claiming separate units. It is to be noted that Chairman Madden refused to accept this reasoning and dissented from that portion of the opinion.

In the first place, it is not a fact that the I. A. M. attempted to organize both the tool room employees and the production employees at approximately the same time. Organization in the tool room had been completed and the closed-shop contract entered into by August 6th. It was not until August 10th, by the Board's own findings, that the I. A. M. attempted to organize in the production department, and it was not until October 15th that the production local obtained a charter.

The Board argues that this division was artificial. Why it was artificial is not stated. For many years the I. A. M. has organized production and skilled workers into separate, distinct lodges whenever the size of the plant or community warranted it. This practice is one prescribed in its constitution; it is one which has customarily followed. See Article A, Section 2 (R. 254-255); Article A, Section 7 c (R. 256), and Section 6 of Article B (R. 257), which states that in localities where there are sufficient numbers of machinists, die sinkers, tool and die makers, specialists, production workers or machine helpers employed in any one or more divisions of the trade, **separate local lodges** may be organized for the benefit of these employees in their respective divisions. In practice, the provisions of section 6 have been construed to require separate local lodges wherever possible. This classification is not an arbitrary act on the part of the I. A. M. Many unions make such classifications, and generally they are accompanied by a difference in dues, duties and obligations. An unskilled worker in a machine shop, earning a moderate sum of money, may pay 70 cents a month as dues for membership in the production workers' union, whereas the highly

skilled and higher paid craft worker may pay $2.00 per month as dues for membership in his local union. The diversity of problems affecting the workers in the highly skilled crafts and the workers in the unskilled production end of the industry frequently brings about demands on the part of these workers for separate charters and for separate locals from the International Unions. It is only natural that the different interests of skilled and unskilled machine workers, and the different nature of the work performed by them, should result in their forming separate locals.

It should also be noted that tool and die makers are part of a different labor market from production workers. Many commercial tool and die shops handle contract work from plants which would otherwise employ their own tool and die makers to manufacture the tools, dies, jigs and fixtures necessary to plant production. Tool and die makers follow the tool and die-making trade, and it makes little or no difference if the tool room in which they work is run in connection with an auto parts manufacturing plant or a plant in the electrical industry, or is operated independently on a contract basis turning out work for many plants in the community.

There are other considerations which we could dwell upon, but the foregoing will suffice to demonstrate the practical necessities which require this division.

However, regardless of its reasons, it is submitted that what the I. A. M. does in respect to its internal affairs, is entirely its own business. The National Labor Relations Act was not passed for the purpose of giving the Board a carte blanche to inquire into the internal workings of labor organizations and to probe their organizational policies with the end of agreeing or disagreeing therewith. Organized labor is extremely apprehensive over this policy of the Board, and it is of vital importance that the Court protect labor organizations from this outrageous inter-

ference with their internal affairs. When the National Labor Relations Act was passed organized labor was assured that there would be no such interference. On November 13, 1935, Senator Wagner wrote a letter, which has since become a public document, to Daniel J. Tobin, general president of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, in which he gave this assurance to organized labor. We quote from this letter:

> "As author of the legislation I can say very definitely that it was never intended to permit the Labor Board to interfere in the internal affairs of labor organizations, and I do not believe there are any words in the Act conferring such power."

The court below and the Board, in its brief, argue that there existed a certain integration between the work of the tool and die workers and the rest of the production work in the plant, and this consideration freed the unit finding from any taint of arbitrariness. Obviously, there is an integration in every industrial plant between the work of any craft group, such as tool and die makers, pattern makers, buffers and polishers, etc., and the functions carried on by the rest of the workers in the plant. If that were the sole criterion the craft units could never be certified. However, the Board, in its decision, did not rely on this factor. On the contrary, it expressly stated that, except for the two factors of the employer's unfair practices, and the I. A. M.'s method of organizing, the craft unit was appropriate. For the Board's attorney or the court below to search the record for reasons not considered or relied upon by the Board in its unit determination adds to the case facts not present in the decision of the Board and is manifestly unfair. The Board has destroyed the unit claimed by the machinists solely for the two arbitrary reasons afore discussed; it is concerning these rea-

sons only that we make complaint and for which we seek protection against further action of a similar nature.

It is true that the Board also regarded as significant the existence of a substantial C. I. O. minority membership in the tool room. However, the C. I. O. at no time claimed or proved a majority in the tool room, which the I. A. M. did. Evidence of C. I. O. membership, whatever it may be, if made in the face of a majority showing by a rival group, has relevance only to the question of whether an election should be held to determine the choice of type of representative, and has no relevance to the appropriateness as such of the unit in which the membership is claimed. Such a minority showing would merely indicate that the choice of tool room employees was uncertain; not that the tool room was not an appropriate unit. It should be noted that the original C. I. O. petition and complaint made no claim to membership in the tool room unit, and did not include the tool room in the unit requested.

It is submitted that the provisions of section 7 of the act, guaranteeing freedom of choice to employees to choose their own type of representative, obligates the Board to hold elections to determine such choice when a conflict between two admittedly appropriate units arises. It is further submitted that the action of the Board, refusing not only to hold such election but also to designate an historic craft as an appropriate unit for the sole reason of employer activities over which the union had no control, or because of the union's organizational policies prescribed by its constitution, which are no concern of the Board, is arbitrary in the extreme. The American Federation of Labor has encountered no greater threat to the existence of its craft affiliates in the sixty years since its founding than in some of the unit doctrines propounded by the Board. It is earnestly requested that this Court afford protection against such arbitrary decisions by the Board.

III.

IT IS THE DUTY OF THE BOARD TO INVESTIGATE VERIFIED CLAIMS OF A CHANGE IN CHOICE OF A REPRESENTATIVE MADE KNOWN TO THE BOARD PRIOR TO ANY PREVIOUS CERTIFICATION. THE BOARD ERRED IN IGNORING THE CLAIM AND CERTIFYING A RIVAL UNION REPRESENTING ONLY A SMALL PER CENT OF THE EMPLOYEES AS EXCLUSIVE BARGAINING AGENT ON THE BASIS OF A YEAR-OLD MAJORITY STATUS.

The final question presented for review is one on which there is a conflict between the decision of the court below and decisions of the Second and Eighth Circuits. The question concerns the duty of the Board to take into account or to investigate a verified claim of a change in majority status occurring during the long interval between a hearing and a decision and made known to the Board prior to its decision.

It is submitted that the Board has erred in ignoring the existing status of representation among employees of the Serrick Corporation, in ordering the employer to bargain exclusively with an organization which no longer represents a majority, and in refusing to conduct an election as expected and requested. The present argument relates to and challenges sections 1 (e) and 2 (g) (5) of the Board's order (R. 363).

The question raised is a practical one, particularly in view of the long period of time which customarily elapses between the filing of charges and the issuance of a decision in a contested case. Is the mere filing of charges under Section 10 of the National Labor Relations Act, and the issuing of a complaint thereunder, to be held to crystallize the employer-employee relationship as of the time of

the alleged unfair labor practices? Are the employees to be forestalled from exercising their right of selecting a representative of their own choosing and preventing from changing their affiliation, even in the face of a considerable lapse of time?

A. History of Change of Representation and Notice to Board, Which Was Ignored.

The original petition for certification was filed August 16, 1937. During the hearings on the petition and charges it was stipulated that the U. A. W. had 471 signed application cards, and the I. A. M. 298, among production employees (R. 175-176). However, this stipulation was entered into for the purpose of avoiding any delay that would arise from checking and rechecking the cards, and it was stipulated only that the parties could present the cards that each claimed, not that the cards were genuine or would be determinative of the issue concerning representation (R. 159). In a September, 1937, agreement before Circuit Judge Guthrie, of Muncie, Indiana, it was stipulated by the parties then engaged in a strike over representation that the parties would abide by the result of an election to be conducted by the Board in the present case (R. 163-168). The I. A. M. at all times subsequent to the decision expected that an election would be held (R. 84-86, 158-160).

The Board did not decide the case until July 27, 1938. During this period of almost a year both of the rival unions proceeded with organizational activities in anticipation of the expected election. Several months prior to the time the Board decided the case the I. A. M. obtained a 90 per cent majority membership, and the employer was notified of this fact. Regardless of this notification, however, the company granted a contract to the U. A. W., recognizing it as exclusive bargaining agent. This was done

on July 15, 1938. Immediately thereafter the I. A. M. issued a vigorous protest to the Board by telegram and by verified statement and affidavit, in which C. F. McDonald, Grand Lodge Representative of the I. A. M., set forth, under oath, the fact that a change in representation had occurred and that the I. A. M. represented a majority. Finally a lengthy letter to the same effect was written by counsel of the I. A. M. to the Board. The Board was asked to investigate this claim and to take appropriate action thereon (R. 11-15). The Board, however, refused even to investigate the claim of the I. A. M.

It is submitted that the Board acted arbitrarily in certifying the U. A. W. as exclusive representative of all production employees in the face of the verified notification and strenuous protest made with it prior to its decision. The court below upheld the Board's action in this respect, stating, as reasons, first, that any shift in affiliation might have been occasioned by the employer's unfair practices in favor of the I. A. M. (although the employer entered into an exclusive contract with the U. A. W., thereby favoring that organization, not the I. A. M.), and, second, that at the time of the hearing there was no doubt as to the majority, and that subsequent "*ex parte* and self-serving assertions that a shift has occurred * * * would make a merry-go-round of the act" since "like representations could be made in turn following each new one by the contending unions in order to prevent or delay a decision contrary to their interests * * *."

B. **Second and Eighth Circuits Hold Contra to Court Below.**

This holding is directly opposed to a holding of the Eighth Circuit in the case of the **Hamilton-Brown Shoe Company v. National Labor Relations Board**, 104 F. (2d) 49. In that case a situation identical to the present one

existed. Subsequent to the hearing, but prior to the decision, a change in representatives from the C. I. O. to the American Federation of Labor had occurred. The Board was notified of this change by letter and by petition. The Board ignored the notification and certified the C. I. O. union as the exclusive bargaining agent. The Court held such conduct arbitrary and contrary to the letter and spirit of the act. The Court stated:

> "The Supreme Court, in Consolidated Edison Co. v. National Labor Relations Board, supra, held that the refusal of the Board to permit the employers to adduce certain additional testimony which could have been received without undue delay, was unreasonable and arbitrary. Having in mind that it is the fundamental policy of the Act to permit employees freely to choose their representatives, it follows that the employees have a right to change their choice, and when that fact has been brought sharply to the attention of the Board, as in this case, it was, **we think, the duty of the Board to investigate the claim.**" (Emphasis ours.)
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> "So, in the instant case, the Board, after giving effect to its order to restore the *status quo* by reinstating the employees wrongfully discharged, and by disestablishing the company union, and requiring the employer to cease and desist from recognizing such union as a bargaining agency, should settle the question as to representation by requiring an election. We are of the view that it would be arbitrary and unfair, and not in keeping with either the letter or the spirit of the Act, to require the employer and its employees to conduct their negotiations through an agency not fairly representing a majority of the employees. In the face of the record as it stands, it cannot be assumed that the Union is now the accredited representative of the employees, but the showing made, and it stands without dispute, is at least sufficient to re-

quire investigation and to cause a court of equity to inquire whether an order requiring both the employer and the employees to recognize the Union as the bargaining agency should be enforced in the face of circumstances making such enforcement unwise, if not illegal. A court of equity will not do useless, unjust, or unequitable things. In re Hawkins Mortgage Co. (C. C. A. 7), 45 Fed. (2d) 937. Courts do not deal with abstractions. The proceedings here are substantially proceedings in equity in that equitable rules are applicable. National Labor Relations Board v. Cherry Cotton Mills (C. C. A. 5), 98 Fed. (2d) 4444. This court is granted power to modify orders of the Board [Section 10 (f)]."

The holding of the court below is likewise in direct conflict with the decision of the Second Circuit in **National Labor Relations Board v. National Licorice Co.**, 104 Fed. (2d) 655, decided June 12, 1939. In that case a period of two years had elapsed since the time when the company had refused to bargain with a union then representing a majority. Further, the union had then just organized the shop (a circumstance likewise present in the instant case). The Court held that, under such circumstances, the order of the Board, directing the company to bargain with the union representing a majority at the time of the hearing, should be modified to provide for the holding of an election. The Court stated in this respect as follows:

"This leaves only paragraphs 1 (d), 1 (e), 11 (c), 11 (d) and 11 (e) of the order. Paragraphs 1 (e), 11 (d) and 11 (e) we will not disturb, but 1 (e) and 11 (d) seem to us to require some modification. The finding of the Board that the union represented the respondent's workmen necessarily related to July, 1937, at which time the union had only just organized the shop. The strike followed in two weeks and failed, and then came the company union; we know nothing more. It is now nearly two years after the tentative

> organization of the factory, for it was really only tentative, the applicants not having yet been accepted; and our order will be conditioned upon the Board's ascertaining by a new election whether the union is now the choice of the majority; otherwise there is some chance that it may not represent their present wishes. In **National Labor Relations Board v. Remington Rand, Inc.**, 94 Fed. (2) 862, 869 (C. C. A. 2), we held that the 'Joint Board' has a continued presumptive authority which the employer must overcome by evidence, but in that case the union had been established a year before the trouble arose. Here there is no ground for such a presumption. Moreover, the workmen are few, and an election will not be an onerous condition."

The decisions of the circuits are in conflict. The factual situations cannot be differentiated. Which view is correct? It is submitted that the theory and the reasoning of the Eighth and Second Circuits is more consonant with the spirit and purpose of the act and more in accord with practical realities.

C. Entirely Practicable for Board to Investigate Claims of Change. Not to Do So Productive of Turmoil and Chaos.

The argument of the court below is that, under the rule contended for, interminable delay would result so that the act would become a "merry-go-round." The answer to this argument is that the Board need merely hold an election in cases such as the present one, where it is informed under oath that there has been a change in choice of a representative. The holding of an election, by secret ballot, after ordering the employer to cease any unfair practices he might have engaged in at such time the Board is satisfied that the effect of these practices has worn off, will conclusively settle the problem for a period of an-

other year at least, since the Board's usual rule is that certification following an election will be binding for a period of one year. It will be unnecessary to hold a number of successive hearings upon successive representations of changes of majority, as predicted by the court below.

Nor is it necessary in all cases to hold elections if preliminary investigation reveals there is no merit in the claim of change. The Board, by its "merry-go-round" argument, is raising a spectre which does not exist. The *filing of successive* frivolous allegations *of changes* in representation is well within the Board's power to control, just as at the present time it controls the filing of successive petitions for representation under section 9 of the act by briefly investigating the bona fides of the petitions and refusing to entertain those which it discovers are frivolous. If, on preliminary investigation, the union is unable to produce satisfactory evidence in support of its claim, the claim can be ignored, and no one could accuse the Board of acting in a high-handed or arbitrary fashion. If, however, the investigation reveals that the claim is valid, certainly only disruption and chaos can result from disregarding the changed circumstances. Certainly no possible policy of the act is effectuated by ignoring the change, but, on the contrary, industrial strife would be fomented. In the present case, however, the Board made absolutely no attempt to make an investigation, preliminary or otherwise, but certified an organization in the face of a sworn statement that that organization represented only a small minority of the employees. Can it then be said that the Board acted in a reasonable manner? We submit that it has not.

If there is any question of the unworkability of the act, that question is a much more acute and real one under the construction contended for by the Board whereby an employer is obliged to continue to bargain with a union which

in fact represents only a small minority in its plant, and the wishes of the employees are entirely disregarded. Such a construction would stir up and give rise to exactly that industrial turmoil and unrest which the act was designed to prevent, for it is certain that employees will not easily submit to an order depriving them of their desired bargaining agent, contrary to the rights guaranteed them to choose and change their representative at their will.

D. Right of Employees to Select Representative Includes Right to Change Representatives.

Whatever unworkability may exist is inevitable in a democratic system of administration of labor relations by government tribunals. To refuse the right of at least a preliminary investigation into the validity of a claim affecting a proposed order after a long lapse of time between hearing and order for the sake of any imagined "workability" is to deny employees the very rights for the protection of which the act was passed.

Courts of equity have never sanctioned action resulting in unjust or useless ends. Consider the confusion and the injustice if, for instance, under the Board's "presumptive representation theory," the employer entered into a closed-shop contract with a minority representative which he has been ordered to deal with in spite of a change of representation. There is no way in which the actual majority representative could challenge such contract, and it would be conclusively and indefinitely barred from its right to serve as bargaining representative, and a great majority of employees forced into a union not of their own choosing.

The act grants to employees full freedom of choosing representatives. This freedom includes the liberty to change representatives, a liberty which is denied to the employees of the Serrick Corporation.

The Board asserts as an additional reason for its order that it is its duty to restore the "status quo" as it existed

at the time of the unfair practices. However, this duty would exist only in so far as the "status quo" has been affected or altered by activities of the employer. In so far as the "status quo" has been altered by the acts of the employees themselves, or by circumstances over which the employer has no control, the Board has no power to order a restoration. In the present case the Board does not claim as a fact, the record does not indicate, and there is no contenion that the present majority achieved by the petitioner is the result of the employer's unfair tactics concerning which the original hearing was held. In the present case petitioner claims, and it is a fact which it should at least be permitted to establish at a hearing, that it represents a majority of the employees who have become affiliated of their own choice, free from coercion of any kind on the part of the employer, and in no way the result of the practices complained of in the original complaint. A majority of the Serrick Company employees have simply changed their minds as to their choice of a representative, an occurrence not infrequent in this day of competitive unionism. Any attempt to restore a previous status quo must and can be made only so far as is consistent with existing facts brought to the Board's attention, and as is consistent with the purposes of the restoration, which is solely to remove the effect of the unfair labor practices of the employer and to oblige him to conform to the act in the future. Accordingly, the most important consideration is: What caused the change? The Board could not, for instance, presently order an employer to deal with a representative no longer in existence (many unions have dissolved in less time than the Board took to decide this case), or it could not order an employer to deal exclusively with a past majority, when that majority no longer exists, as where a large portion of the employees had left the plant for more remunerative employment elsewhere.

In the last analysis the Board is here trying to restore

what amounts to a previous mental condition of the employees—their desire and choice of a representative—something which has nothing whatsoever to do with requiring the employer to comply with the National Labor Relations Act. The rule of restoring a status quo is particularly difficult to apply in the case of an employer's unfair practice of refusing to bargain, especially after a long elapse of time between the commission of the practice and the final order. That which determines an employer's duty to bargain and the employer's right to a representative depends on too many considerations outside of the employer's control for the Board to be able to apply dogmatic principles. To bargain exclusively is not a single act remedied by a single performance on the part of the employer. It calls for a continued course of conduct by the employer and a continued desire to bargain through a particular representative by the employees. It is totally unlike an order requiring an employer to reinstate someone who has been discharged. Even in reinstatement cases the Board has taken into consideration factors and circumstances arising subsequent to the time of the unlawful discharge, as where, for instance, it is brought to the Board's attention that the employee to be reinstated has obtained substantially equivalent employment elsewhere, or that an actual decrease in business has necessitated the elimination of the particular job to which the employee was to be reinstated, or that the employee has died, or that some other factor has entered, making the order of reinstatement either impossible, unnecessary or otherwise improper.

If there is any fear of a continued inclination on the part of the employer to disobey the bargaining provisions of the act, it can be set at rest by requiring him to bargain with whichever union the Board ascertains, by election or otherwise, is presently the representative of a majority. The only valid purpose of an affirmative order by the Board, under the act, is to obtain present and future com-

pliance by the employer with the requirement of the act that he bargain with the representative of a majority of his employees—not to redress a union for a past grievance.

The Board relies upon the holding of this Court in **National Labor Relations Board v. Bradford Dyeing Corporation,** ... U. S. ..., decided May 20, 1940. In that case the employer had contended that, since the union had lost its majority membership four days after it had requested recognition as exclusive bargaining agent, the Board should not require it to deal with such organization. The Board had specifically found that the employer had caused the loss in membership through its unfair practices. Obviously, in such a case the employer's contention was unsound. In the present case there is no such finding by the Board in respect to the loss of membership by the U. A. W. between the decision and the hearing. Further, the great difference in time between a period of four days and a period of almost one year is sufficient in itself to differentiate the **Bradford** case from the present one. Any presumption that might exist that the loss of membership was due to continued unfair practices of the employer can exist for only a reasonable period of time. Surely, it is extremely unreasonable to continue such presumption for indefinite periods. In the present case the lapse of almost a year is a consideration of importance. If freedom of choice guaranteed by the act is to be permitted, the employees' liberty to change their bargaining representative should not be indefinitely frozen by the filing of charges. Further, any presumption that the company in the present case might have favored the I. A. M., and continued to interfere with the U. A. W., is conclusively rebutted by the fact that in July, 1938, before the decision, but after it had been given notice of a shift in membership, the company entered into an exclusive contract with the U. A. W. covering the entire plant.

E. National Licorice Case Determinative.

The precise situation involved in the present case was before this Court in the case of **National Licorice Co. v. National Labor Relations Board**, decided May 4, 1940. The Court of Appeals of the Second Circuit directed the Board to hold an election to determine the choice of representatives because of the lapse of time, contrary to the Board's order directing the company to recognize and deal exclusively with the complaining union. This Court upheld that decision in the following language:

> "As will presently appear, the bargaining committee and the contracts obtained through its mediation were both the products of unfair labor practices, and the Committee, under the Board's order; was not entitled to recognition as the bargaining representative of the employees. Such injury, if any, as the petitioner might have suffered from the Board's order requiring it to recognize and bargain with the Union, is avoided by the direction of the Court of Appeals that this part of the order be conditioned upon a determination by an election that the Union is still the choice of a majority of the employees. The Board has not petitioned for certiorari and does not complain of this direction."

It is submitted that the **National Licorice Company** case, and not the **Bradford Company** case, is decisive of the present controversy.

F. Prior to Board Decision Application Should Be Made to Board, Not Court.

The court below indicated that petitioners should have applied to a Circuit Court for leave to adduce additional evidence, under Section 10 (e) of the Act. It is submitted that the provision of section 10 (e) was intended to apply to a situation where the need for additional evidence occurs after the Board has entered a decision and order.

10 (e) relates in its entirety to applicable procedure following the making of a decision and order by the Board. In the present case the request was directed to the Board prior to the time that it had made its decision and order. It is only after a decision or order has been entered that the jurisdiction of the Circuit Court over the proceedings arises. It would seem only appropriate that any motion to adduce additional testimony should be addressed to the Board rather than the Court prior to the time a decision or order is made.

Following the refusal of the Board to take notice of the claim of change in representation, the case was appealed to the court below, and the Court was requested in the appeal to permit the taking of additional testimony or to order the holding of an election. It would seem a rather narrow and technical view which would not consider such a procedure in the same nature as a motion to the Court, if that is to be required.

It is submitted that that portion of the Board's order [Sec. 1 (e), Sec. 2 (g) (5)] requiring the employer to deal exclusively with the U. A. W. is unlawful and contrary to the purposes and policies of the act.

CONCLUSION.

It is respectfully submitted that the Board's decision and order, in so far as it finds:

1. That the I. A. M. had been assisted by the employer in obtaining its majority, and that therefore the contract of August 6th was invalid;

2. That the tool room employees did not constitute an appropriate unit for collective bargaining, or in refusing to hold an election to ascertain the choice of the tool and die makers in this respect;

3. That the employer is required to deal exclusively with the U. A. W. as representative of all pro-

duction workers, ignoring the claims of the I. A. M. that it represented a majority in the production department and refusing to conduct an election;

is erroneous and contrary to the purpose and policy of the act; and that the court below erred in sustaining such decision and order.

Respectfully submitted,

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Dated September 14, 1940.
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